

The ALJ found Howard H. Tate's accidental death that occurred while he was on his way to work for the respondent arose out of and in the course of his employment. The ALJ concluded the "going and coming" rule did not apply to the decedent because he was an

employee who provided emergency services and he was responding to an emergency at the time of his death.

The respondent appeals and argues the ALJ erred. The respondent contends the "going and coming" rule does apply to the decedent's accidental death. The respondent argues the claimant was on the way to assume the duties of his employment and none of the exceptions to the "going and coming" rule apply. Accordingly, the respondent contends the decedent's accidental death did not arise out of and in the course of his employment with respondent.

In contrast, the decedent's surviving spouse, Barbara Tate, argues the ALJ did not err and that the Board should affirm the Award. The surviving spouse argues that the "going and coming" rule does not apply to the decedent's accidental death because he was employed as a provider of emergency services and the decedent's accidental death occurred while responding to an emergency.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions of law:

Findings of Fact

On Saturday, February 9, 2002, the decedent died from injuries sustained in a single automobile accident. At the time of his death, the decedent was employed by the City of Junction City, Kansas, working as an Equipment Operator II in the street department. The decedent's regular working hours were from 7:30 a.m. to 4:30 p.m., Monday through Friday. The decedent chose to live in White City, Kansas, instead of Junction City, Kansas. White City is located approximately 24 miles southeast of Junction City.

As an Equipment Operator II, one of claimant's job duties was to operate a snow plow and spreader in cleaning city streets during snow and/or ice storms.¹ The decedent, however, was not on call and he was not required to work overtime.² Most of the city workers wanted to work overtime.³ The decedent was not required to be at a place where he could be reached if he was needed to work overtime.⁴

¹ Ibarra Depo. (Oct. 4, 2002), Ex. 1.

² Id. at 10-12.

³ Id. at 14.

⁴ Id. at 14-15.

On February 9, 2002, a snow and ice storm commenced in Junction City about 1:30 p.m.⁵ Because of the snow storm, Erle Bergstrom, the street department foreman, started calling some of his workers into work to clear the streets. One of those workers was the decedent. The decedent did not have a telephone, but had provided his employer with a telephone number to call and leave a message. The message number was the telephone number of his neighbors, Vernon and Mary Clemons, who lived across the street.

Mr. Bergstrom could not reach claimant because the Clemons' telephone was busy. Because Mr. Bergstrom was having trouble keeping his truck running outside in the snow storm, he asked his wife to attempt to reach the decedent and ask him if he wanted to come to work.

Mrs. Bergstrom finally reached Mary Clemons and asked her if she would "leave a message for Mr. Tate to -- for Howard, to see if he could come in to work -- because it was snowing and they'd need some help."⁶ After that telephone conversation, Mary Clemons went over to the decedent's house and notified him that ". . . your work called and they wanted to know if you wanted to come into work."⁷ The decedent then put his overalls on ready to leave for work. He did not, however, leave immediately, but sat down at the table with Mrs. Clemons and his wife and had a cup of coffee.⁸

During decedent's regular work week, or any time he was called in to work for overtime, he reported to work in Junction City, Kansas, at the street department room located in the public works building.⁹ The decedent was only paid from the time he reported to his foreman at the public works building.¹⁰ No city workers were paid wages either on a regular work day or an overtime call-in situation while on their way to work from their home to the public works building.¹¹ The decedent was not expected to respond to a call for overtime by driving at excessive speeds with red lights flashing.¹² The decedent

⁵ Erle Bergstrom Depo. at 8.

⁶ Phyllis Bergstrom Depo. at 6-7.

⁷ Clemons Depo. at 12.

⁸ Id.

⁹ Ibarra Depo. (Oct.14, 2002) at 4.

¹⁰ Id. at 4-5.

¹¹ Id. at 6.

¹² Id. at 31-32.

was only expected to respond to a request for overtime work as soon as possible but driving in a safe manner.¹³

The decedent died in a single vehicle accident on his way to work on February 9, 2002. The decedent was found, on Monday, February 11, 2002, thrown from his vehicle face down into a ditch of water. At the time of the accident, the decedent's vehicle was northbound on U.S. Highway 77 traveling toward Junction City, Kansas. The vehicle had slid off the highway on the west shoulder, down an embankment and over a box culvert. The vehicle overturned and came to arrest on its wheels in 18-20 inches of water. The investigating highway patrol officer opined that the snow and the sleet weather conditions contributed to the decedent's accident.¹⁴

Conclusions of Law

This appeal involves the application of the "going and coming" rule contained in K.S.A. 2001 Supp. 44-508(f) which provides as follows:

The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. **An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.** (Emphasis added).

K.S.A. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employer while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.¹⁵

But K.S.A. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's

¹³ Id. at 32.

¹⁴ Sparks Depo. at 19.

¹⁵ See *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

premises.¹⁶ Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.¹⁷

The Kansas Appellate Courts have also carved out exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.¹⁸

In 1996, the legislature amended K.S.A. 44-508(f) and added the following language:

An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.¹⁹

The ALJ in awarding the decedent's widow workers compensation survivor benefits found the decedent fit the foregoing exception. The ALJ concluded the decedent was a provider of emergency services and was killed responding to an emergency. In support of that finding, the ALJ considered both the 1996 amendment and the Kansas Supreme Court analysis and reasoning found in *Estate of Soupene v. Lignitz*, 265 Kan. 217, 960 P.2d 205 (1998).

In *Soupene*, while responding to a fire call, volunteer firefighter Gary Soupene, was killed when his vehicle collided with that of another volunteer firefighter, Robert Lignitz. Soupene's Estate brought a common law damage action against Lignitz. The Kansas Supreme Court affirmed the trial court's holding that granted Lignitz's motion for summary judgment holding that both Soupene and Lignitz were covered by the Kansas Workers Compensation Act. Soupene's fatal accident occurred before the above stated 1996 amendment to the "going and coming" rule. But the Kansas Supreme Court's opinion was filed in 1998 after the 1996 amendment.

The Kansas Supreme Court, however, discussed the 1996 amendment because the Soupenes' emphasized this change in the language of K.S.A. 44-508(f) and argued that

¹⁶ See *Thompson v. Law Office of Allen Joseph*, 256 Kan. 36, Syl. ¶ 1, 883 P.2d 768 (1994). (where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.)

¹⁷ See *Chapman v. Beech Aircraft*, 258 Kan. 653, 907 P.2d 828 (1995).

¹⁸ See *Messenger v. Sage Drilling Co.*, 9 Kan. App.2d 435, 680 P.2d 556 rev. denied 235 Kan. 1042 (1984).

¹⁹ L. 1996, ch. 79, § 3.

a change in the wording of a statute implies a change in the law. In *Soupene*, the court reasoned that responding to emergency calls was an integral and necessary part of a volunteer firefighter's duties, which entailed a special degree of inconvenience and urgency. Additionally, the court found when an emergency call was received, volunteer firefighters were expected to report either to the fire station or the site of the fire. Moreover, the court reasoned that volunteer firefighters had no set hours of employment, but rather were on call and assumed the duties of their employment when they received an emergency call and began to respond.²⁰

The court went on to find that a volunteer firefighter responding to a fire call is an activity that was causally related to his employment, and, therefore, an accident which occurred while responding to such an emergency arose out of and in the course of his employment. Also, the court found that *Soupene's* accident occurred in the course of employment, as he had assumed the duties related to his employment when he began responding to the emergency call.²¹

Here, however, the Board concludes that the decedent's employment as an Equipment Operator II for the respondent does not fit the emergency services exception to the "going and coming" rule as does emergency employees such as volunteer firefighters, regular firefighters, policemen or ambulance drivers. First, the decedent's job did not require him to regularly respond to emergency calls and, therefore, that was not an integral and necessary part of his duties. Second, the decedent's job did not entail a special degree of inconvenience and urgency. Third, when decedent responded to the request to work overtime, he did so in the same manner as he would have done each regular work day during the week. There was not a sense of urgency and he did not hurry and leave for work immediately after he put on his work clothes. In fact, he sat down and had a cup of coffee before he actually left for work. Fourth, there is no evidence that decedent had to drive at an excessive speed or he had to use emergency lights to get to the overtime work. Fifth, decedent was not required to work overtime and he was not expected to work overtime. Sixth, the decedent's acceptance of overtime was completely voluntary. Seventh, the decedent was not on call and he was not expected or requested to be at certain place or at home to receive an overtime request. Lastly, the decedent was not paid either during the regular work week or during an overtime call in until he reported to his supervisor at his place of employment in Junction City, Kansas.

In conclusion, the decedent was unfortunately killed on his way to assume his duties of employment with the respondent and pursuant to the "going and coming" rule his death did not arise out of and in the course of his employment with respondent. Accordingly, the

²⁰ *Estate of Soupene*, 265 Kan. at 225.

²¹ *Id.*

Board reverses the ALJ's November 1, 2002, Award and the decedent's surviving spouse, Barbara Tate, is denied workers compensation benefits.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 1, 2002, is reversed. The reporter fees assessed as costs against the respondent and its insurance carrier in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this _____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I would affirm the ALJ. At the time of his fatal accident, claimant was not on his usual commute to his regular scheduled work. Rather, claimant was responding to a public safety emergency. As such, he was acting as a provider of emergency services within the meaning of the statute.

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director